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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1121

ESTES EXPRESS LINES, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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APPELLANTS' REPLY TO MOTIONS TO AFFIRM

STATEMENT

Appellees' Motions to Dismiss are grounded upon the gratuitous assumption that there is a difference in the service provided by Railway Express Agency, Inc. (REA), between Washington, D. C., and Richmond, Va., and that of appellants. Stated otherwise, they claim that there is an essential difference in the motor carrier service provided by REA and the service of general freight carriers, as they term appellants. Accordingly, they conclude that the supporting shippers knew there to be a difference in the service provided by REA and the service of appli-

cants, and there was no need for them to submit those items of information required to be submitted by applicants generally under the regulations set forth in 49 C.F.R. 1131.2(c) (8)-(9), quoted at pages 7-8 of the Jurisdictional Statement (J.S.). Appellees assume, without fact or other support, the validity of their *implied exemption* theory and then assert that there is no conflict between the Fourth and Ninth Circuits because the contesting carriers involved in *Acme Cartage Co.* v. *United States*, 290 F. Supp. 453 (W.D. Wash. 1968) were all general freight carriers and thus full compliance with the governing regulation was there required. On their invalid assumption to the effect that REA's proposed service is different from that rendered by appellants, they reach the necessarily erroneous conclusion that a real distinction underlies the Fourth Circuit's refusal to follow the decision of the Ninth Circuit.

ARGUMENT

A. As A Matter Of Fact And Law There Is No Essential Difference Between The Services Provided By Appellants And Those Provided By REA

While appellants concede that some general commodity carriers may not render a full blown "express service" on all commodities, that situation does not prevail here. The reason for the difference in service in other cases is that the franchises held by some general freight carriers contain restrictions preventing them from handling certain classes of traffic. See, for example, *Railway Express Agency, Inc.—Extension—Nashua, N. H.*, 91 M.C.C. 311 (1962). However, a certificate authorizing the transportation of general commodities without restriction includes the right to transport express. *Transportation Activities of Arrowhead Freight Lines*, 61 M.C.C. 131 (1952); *Sheetz Common Carrier Application—Express*, 10 M.C.C. 393, 395 (1938). Moreover, the fact that a motor carrier's authority is restricted against the transportation of liquid commodities in tank vehicles, commodities re-

quiring special equipment, and household goods does not prevent the carrier from providing an express service. *Railway Express Agency, Incorporated — Extension — Nashua, N. H., supra* at 329; *Mistletoe Express—Extension—Texas*, 61 M.C.C. 737, 747 (1953).

Appellant, Wilson Trucking Corporation, holds certificated motor carrier authority to transport general commodities, except commodities in bulk,[1] between Richmond, Va., and Washington, D. C., over U.S. Highway 1 and Interstate Highway 95, serving the intermediate and off-route points of Woodbridge, Quantico, Fredericksburg, and Ashland. Just as REA does, Wilson holds itself out (1) to transport any commodity which may be safety transported in ordinary van-type equipment, including those requiring a maximum degree of care or security or both, (2) to provide such care or security or both as the inherent characteristics of the commodities making up the shipments which are accepted may require, (3) to provide equally expeditious transportation and careful handling for all accepted shipments, regardless of their volume, special demands, or value, from the point of pick-up to the point of delivery, (4) to perform actual operations between all authorized points upon firmly established schedules allowing minimum practicable highway transit time and providing fixed delivery times which are available to actual and potential shippers at authorized origins and which in practice are not changed except after substantial notice to the general public, and, (5) to use relatively simple billing, rate structures, and rate publications whereby the rates and charges for the services offered and performed may easily be determined with a minimum of delay.

That Wilson renders a service identical to that of REA is made manifest by the fact that it has been transporting

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[1] Authority to transport general commodities, moving in express service, does not authorize the transportation of commodities in bulk. Thus, *REA* may not transport such commidities either. *Railway Express Agency, Inc.—Extension—Nashua, N.H. supra.*

traffic between Richmond, on the one hand, and, on the other, Bremo, Scottsville, and Smithfield, Va., in connection with REA. It has transported live animals, flowers, furs, and other valuable articles. It has provided protective services in transit for freight requiring it and also offers armed guard service when requested. (Appellants' Joint Protest, pp. 15-16.)

Similarly, appellant Estes Express Lines holds authority to transport, over regular routes, general commodities (with certain exceptions not here pertinent) and provides regularly scheduled service on the movement of small parcel traffic between Alexandria and Richmond. Estes Express participates in a number of so-called agency tariffs and interlines with connecting carriers at its principal terminal points traffic moving to and from points throughout the United States. Again, in refutation to the improperly assumed *difference in service* theory urged by appellees, Estes Express participates with REA in the latter's Motor Tariff ICC A-3, Item Nos. 7450, 7500, and 7550 issued by L. R. Burke, effective February 24, 1967, in the transportation of express traffic serving a number of points in Virginia. (*Id.*, at 10-11) The remaining appellants hold a wide variety of general commodity authority and offer regularly scheduled service in the movement of small parcel traffic in the area under consideration. (*Id.*, at 12)

Contrary to appellees' contention,[2] there is no essential difference in the character of the service being provided

[2] Significantly, in *Saginaw Transfer Co.* v. *United States*, 275 F. Supp. 585 (E.D. Mich. N.D. 1967), the court refused to rubber stamp the Commission's finding that the service proposed was an express service because it was to be provided by REA. The court chastised the Commission for employing the term "express service" in attempting to support the order there under attack and at the same time failing to define the term. Here, appellants are faced with a somewhat similar situation in that we are told to wait until the permanent application is resolved to determine whether appellants are able to provide the service or even whether such service is a true express service. This may take years as the history of the ICC's handling of REA applications proves.

by REA between Washington, D. C., and Richmond, Va., and that rendered by Estes Express and Wilson. Appellants are providing "express" service both in fact, and as that term has been employed in the transportation industry and as described and applied by the ICC.

Since Wilson and Estes Express are providing an "express service" in connection with REA in Virginia as parties to tariffs with appellee and hold authority and have expressed the willingness to provide the same type of service between Washington and Richmond, this case is not factually distinguishable from *Acme Cartage*. Moreover, to further highlight the conflict in the Circuits, the United States District Court for the Western District of Washington, Southern Division, has rendered another decision (*Black Ball Freight Service*, et al. v. *United States*, Civil Action No. 3828, decided March 26, 1969) following its prior holding in *Acme*. For the convenience of the Court, a copy of the opinion of the District Court (not yet reported) is appended.

B. The Suggestion That All Issues Will Be Properly Resolved In The Permanent Application Proceeding Reveals The Evils Of The Commission Action In This Case

The Government contends that appellants "exalt form over substance" and that the action of the Commission "is merely a preliminary determination designed to maintain the existing express service for the time being." (pp. 4-5) The foregoing approach had to be taken by the Government because it recognized that the teaching of *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942), *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), and *Service* v. *Dulles*, 354 U.S. 363 (1957), had been ignored by the Commission. Nowhere does the Government attempt to come to grips with the issues raised in the Jurisdictional Statement. Being unable or unwilling to discuss the essential points raised by appellants, the Government, with a "pillow punching" approach, attempts

to persuade this Court through unexpressed but necessarily implied argument, that if appellants have been wronged, their wounds will be quickly bound. The faults with the approach taken are two: (a) the Government fails to meet with candor the issues raised, thereby depriving the Court of its right to know whether in fact the Commission violated its own regulations, and (b) it reveals that counsel for the Government refuses to recognize that delayed handling of REA permanent applications where temporary authority is outstanding results in a "built-in" denial of administrative due process in both the temporary authority proceeding and the permanent application.

It is argued that whether the temporary authority was infested with irregularity is of no consequence because regularity of procedure is assured later on. How much later? The Jurisdictional Statement forcefully demonstrates that *temporary* authority is a misnomer because the filing of a corresponding permanent application can result in operations by an applicant under temporary authority for years. (See footnote 6, J.S.) The Government's implied suggestion that the permanent proceeding will be resolved in a short time does not comport with the facts. The Commission has not published the permanent application (Docket No. MC-66562 (Sub-No. 2282)),[3] and appellants have been unable to get the Commission to do so, with the result that they cannot file a protest to the permanent application and have the matter set

[3] In footnote 4 to the Government's Brief, it is stated that the permanent application has been published. Counsel for appellants has been advised by the official at the Commission in charge of the publication of applications that Docket No. MC-66562 (Sub-No. 2282) has not been published in the Federal Register. The Government's citation to the Federal Register refers to a so-called "hub application" recently filed by REA. At page 17513 service is proposed between Washington and Richmond. However, the application does not embrace all the authority sought in Docket No. MC-66562 (Sub-No. 2282). Furthermore, REA makes no claim in its Motion that the permanent application has been published.

down for hearing. In the meantime, appellants are faced with a competitor based upon the Commission's bald characterization of their service as general freight service.

C. The Doctrine Of Mississippi Valley Fully Applies

In the Jurisdictional Statement, *Mississippi Valley Barge Company* v. *United States*, 252 F. Supp. 162 (E.D. Mo. 1966) was cited for the proposition that a valid administrative regulation binds the administrator equally with others, the same as though the provisions of the regulation were prescribed in terms of statute. In other words, we read *Mississippi Valley* as holding that the Commission's regulations dealing with the content of supporting statements have the force and effect of law, bind the Commission like all others, and cannot be waived by the ICC. As to REA's attempt to distinguish *Mississippi Valley*, we submit the doctrine expressed in that case, as well as *Service*, *Accardi*, and *Columbia*, *supra*, is unassailable. Additionally, the ICC's temporary authority rules have a common ground with those involved in *Mississippi Valley*; they are both designed to prevent fraud and misrepresentation.

Railway Express cites *Roadway Express, Inc.* v. *United States*, 263 F. Supp. 154 (N.D. Ohio 1966) in support of its position that the ICC does not have to adhere strictly to its temporary authority regulations. This case is cited for the statement by the court that the Commission is not precluded from exercising its discretionary action to issue certificates of temporary authority on the basis of the rules it has adopted. The court's statement was *dicta*. Prior to this observation, the court noted that during oral argument plaintiff, Roadway Express, for the first time raised the point that the submitted statements of applicant Jack Cole Company in support of its applicaton for temporary authority did not conform to requirements of rules adopted by the Commission, effective July 1, 1965. The court then stated (p. 159), "This ground of

objection to the granting of temporary authority was not raised before the Commission and is deemed waived." Thus the court in *Roadway* never passed upon the issue. Certainly the *obiter dicta* of *Roadway* cannot stand as authority when other courts have more recently in dealing directly with issues involving temporary authority rules and regulations held to the contrary. See *Acme* and *Black Ball, supra.*

CONCLUSION

REA, and appellants, are motor carriers subject to Part II of the Interstate Commerce Act. There is no language in Section 210a(a) or the Commission's Temporary Authority Regulations giving any special consideration or exemption to REA as distinguished from other motor carriers.[4] REA was requred to comply fully with the mandatory requirements of 49 C.F.R. 1131.2(c) as any other motor carrier; it failed to do so and, therefore, the Commission's finding of an immediate and urgent need for its service was arbitrary, capricious, an abuse of discretion, and error of law. If the Commission feels the need for another set of rules regarding temporary authority applications of REA, it should amend its Temporary Authority Rules; for as the court said in *Acme Cartage* (J.S. p. 49):

> Variable and unpredictable enforcement of important and mandatorily stated rule provisions is inequitable in principle and unsound in practice. If particular rules prove over rigid or otherwise unsatisfactory in practice they can be amended as experience dictates. *Service* v. *Dulles*, 354 U.S. 363 (1957); *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407 (1942).

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[4] The conventional rule of statutory interpretation is that where an exemption could have been provided expressly and was not, there is no warrant for implying an exemption. 50 AmJur, §§ 432-433.

For the foregoing reasons, appellants respectfully submit that the questions posed by the decision below are of extreme public importance and require plenary consideration by this Court. Therefore, appellants request that the Motions to Affirm be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Harry J. Jordan, an attorney for the appellants and a member of the Bar of the Supreme Court of the United States, certify that a copy of Appellant's Reply to Motions to Dismiss has been served by first-class mail, postage prepaid, upon the following parties: Hon. Erwin Griswold, Solicitor General, Hon. Richard W. McLaren, Assistant Attorney General, and Gregory B. Hovendon and Robert E. Easton, Attorneys, Department of Justice, Washington, D.C. 20530; C. V. Spratley, Jr., United States Attorney, Alexandria, Virginia; Robert W. Ginnane, General Counsel, and Raymond M. Zimmet, Attorney, Interstate Commerce Commission, Washington, D.C. 20423; John G. Ashton, Vice President and General Counsel, and William H. Marx, Assistant General Counsel, Railway Express Agency, Incorporated, 219 East 42nd Street, New York, New York 10017; H. Merrill Pasco, Esquire, Hunton, Williams, Gay, Powell & Gibson, 700 East Main Street, Richmond, Virginia 23212.

Dated at Washington, D. C., this 15th day of April, 1969.

HARRY J. JORDAN
1000 - 16th Street, N. W.
Washington, D. C. 20036

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

Civil Action No. 3828

BLACK BALL FREIGHT SERVICE; CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE; D-C INTERNATIONAL, INC.; GARRETT FREIGHTLINES, INC.; NAVAJO FREIGHTLINES, INC.; PACIFIC INTERMOUNTAIN EXPRESS CO.; WESTERN GILLETTE, INC.; RISS & COMPANY, INC.; IML FREIGHT, INC.; and AMERICAN TRUCKING ASSOCIATIONS, INC.,

Plaintiffs,

YELLOW FREIGHT SERVICE; T.I.M.E. FREIGHT, INC.; TRANSCON LINES, INC.; CONSOLIDATED COPPERSTATE LINES; TRI-STATE MOTOR TRANSIT CO.; UNITED TRANSPORTS, INC.; BRASWELL MOTOR LINES, INC.; CENTRAL FREIGHT LINES, INC.; CENTRAL EXPRESS, INC.; RED ARROW FREIGHT LINES; BROWN EXPRESS, INC.; ALAMO EXPRESS, INC.; J. H. ROSE TRUCK LINE, INC.; J. J. WILLIS TRUCKING CO.; J. V. HARRISON TRUCK LINES, INC.; MILLER TRUCK LINE, INC.; H. S. ANDERSON TRUCKING CO.; CENTRAL FORWARDING, INC.; ROBERTSON TANK LINES, INC.; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; THE COLORADO AND SOUTHERN RAILWAY COMPANY; THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; ELGIN, JOLIET AND EASTERN RAILWAY

COMPANY; FORT DODGE, DES MOINES AND SOUTHERN RAILWAY COMPANY; FORT WORTH AND DENVER RAILWAY COMPANY; GREAT NORTHERN RAILWAY COMPANY; GREEN BAY AND WESTERN RAILROAD COMPANY; GULF MOBILE AND OHIO RAILROAD COMPANY; ILLINOIS CENTRAL RAILROAD COMPANY; ILLINOIS TERMINAL RAILROAD COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; MISSOURI-KANSAS-TEXAS RAILROAD; MISSOURI PACIFIC RAILROAD COMPANY; NORFOLK AND WESTERN RAILWAY COMPANY; NORTHERN PACIFIC RAILWAY; ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; THE TEXAS AND PACIFIC RAILWAY COMPANY; TOLEDO, PEORIA AND WESTERN RAILROAD COMPANY; AND UNION PACIFIC RAILROAD AND WATERLOO RAILROAD,

Intervening Plaintiffs,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants,

AMERICAN FARM LINES,
Intervening Defendant.

OPINION—FINDINGS OF FACT—CONCLUSIONS OF LAW

Before: JERTBERG, Circuit Judge, and BOLDT and GOODWIN, District Judges

BOLDT, District Judge:

American Farm Lines (AFL) made an application under the provisions of Section 210a(a) Interstate Com-

merce Act, 49 U.S.C.A. Section 310a(a)[1] and Ex Parte No. MC-67, *Motor Carrier Temporary Authorities*, 98 M.C.C. 483, 49 C.F.R. 1131, et seq., to the Interstate Commerce Commission (ICC) for a Temporary Authority to provide single-line motor carrier service. The application appeared in the Federal Register June 8, 1968. The thirty-five motor carrier plaintiffs in this action, twenty-eight intervening rail carrier plaintiffs and many other carriers, protested the application. The Temporary Authorities Board of the Commission (TAB) by order dated July 12, 1968, denied the application. AFL filed a petition for reconsideration, appealing the decision of TAB. Division 1 of ICC, acting as an Appellate Division, by order dated September 3, 1968, vacated the order of denial issued by TAB and granted the application.

Some of the plaintiffs and other carriers filed petitions for reconsideration, which were not authorized by the applicable rule, Ex Parte No. MC-67, *Motor Carrier Temporary Authorities*, 98 M.C.C. 483 at page 496, (49 C.F.R. 1131.6), since neither of the conditions authorizing such petitions was present:

> "(a) Petitions for reconsideration.—Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions for reconsideration of orders of (1) the Temporary Authorities Board, and (2) Division 1 initially granting or denying temporary authority in proceedings not subject

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[1] Interstate Commerce Act, Section 210a(a), as amended, 49 U.S.C. 310a(a), provides:

"To enable the provision of service for which there is an *immediate and urgent need* to a point or points within a territory having *no carrier service capable of meeting such need*, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter." (Emphasis added.)

to prior determination by the Temporary Authorities Board, may be filed by any interested person."

Plaintiffs' complaint was filed in this court on September 26, 1968, together with a motion for an order to stay the going into effect of the ICC order of September 3, 1968.

This motion was argued October 2, 1968 before Judge Boldt per Title 28, Section 2284(3) and (5). After considering oral and written evidence and the argument of counsel, the Court entered an order staying the going into effect of the ICC order of September 3, 1968, and declaring it to be otherwise inoperative pending determination in this Court of the issues presented in this proceeding, or until further order of this Court. At that hearing, counsel for ICC did not challenge the administrative finality of the ICC order of September 3, 1968. By its order of October 9, 1968, ICC recognized the stay order of this Court.[2]

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[2] "Upon consideration of the record in the above entitled proceedings, and the entry of a temporary restraining order on October 3, 1968, by the United States District Court for the Western District of Washington in Civil Action No. 3828, *Black Ball Freight Service, et al* v. *United States*, wherein the Court stated in part:

'IT IS ADJUDGED AND ORDERED that that certain order of Interstate Commerce Commission issued by it in its Docket MC-129908TA application of American Farm Lines, Oklahoma City, Oklahoma under date of September 3, 1968, be stayed from going into effect or otherwise be inoperative pending a determination by this Court of the issues of this proceeding, or until the further order of this Court.'

and good cause appearing therefor:

It is ordered, that the effective date and operation of the order heretofore entered September 3, 1968, in No. MC-129908TA be, and it is hereby, postponed until further order of the Commission.

It is further ordered, that in view of the Court's order and of the order of the Commission, American Farm Lines may not now perform any for-hire operations in interstate or foreign commerce pursuant to the Commission's order of September 3, 1968, entered in this proceeding.

On October 16, 1968, the Department of Defense filed with ICC a reply to the petitions for reconsideration, and on October 17, 1968, AFL filed a combined reply to the petitions for reconsideration and a petition to reopen. Many plaintiffs filed motions to strike these pleadings on the ground they were not authorized by ICC Rule 49 C.F.R. 1131.6, nor by any other rule.

On November 12, 1968, ICC filed in this court a "Motion to Stay Further Proceedings Herein," stating therein that on November 5, 1968, on its own motion, ICC had reopened the proceeding before it and requested a stay of further action in the case before this court. By their prompt opposition to this motion, plaintiffs contended that ICC was not authorized to reopen its proceeding because this court had taken jurisdiction of the matter. Also, plaintiffs asserted that even if the court had not taken jurisdiction, the ICC Rules precluded reopening of the proceeding. No action has ever been taken to note the ICC motion for hearing or to otherwise procure the stay sought by the motion.

The same contentions were presented to ICC in plaintiff's motion for vacation of the reopening order.

Since the ICC order of November 5, 1968 recited that a verified statement from the Department of Defense would be received, and no ruling having been made on their petitions to vacate the order of November 5, plaintiffs responded to the Caputo verified statement submitted by the Department of Defense. These responses asserted plaintiffs had satisfactorily performed all services previously requested of them and their willingness and ability to perform any service requested of them by any shipper, including the Department of Defense.

On December 19, 1968, ICC issued a new order in the same docket granting AFL the same temporary authority previously granted by the ICC order of September 3, 1968 as to which the stay order of this court was and still is in full effect.

On December 31, 1968, pursuant to Fed. Civ. R. 15(d), plaintiffs filed in this court a "Supplemental Complaint Setting Forth Transactions or Occurrences or Events Which Have Happened Since the Date the Original Complaint was Filed Herein" and a motion to stay the going into effect of the ICC order of December 19, 1968.

Following extended argument, on January 6, 1969, Judge Boldt entered an order restraining the going into effect of the ICC order of December 19, 1968 and ordering it to be inoperative until further order of this court. Full hearing on the merits was heard by the Three-Judge Court on January 24, 1969.

The issuance of the ICC order of September 3, 1968 was based on a supporting letter written by the Department of Defense, dated May 15, 1968. The ICC also had before it a letter dated April 30, 1968 written to the president of AFL wherein the Department of Defense stated it was not in a position to verify that there would be insufficient or inadequate service to meet Department requirements in the absence of the single-line service AFL seeks to provide.

"As authorized by the ICC Act, after extended consideration the ICC adopted Temporary Authority Rules, effective July 5, 1965, specifying procedures for the submission and determination of temporary authority applications under Section 210(a) ICC Act. Ex Parte No. MC-67, 49 C.F.R. 1131. . . . The rules specifically provide in mandatory terms that each filed temporary authority application must be accompanied by one or more supporting statements and each such statement must contain at least the information specified in eleven categories," *Acme Cartage Co., et al.* v. *United States, et al.*, 290 F.Supp. 453 at page 454. Among those categories are:

"(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

"(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal."

The ICC Rules, 49 C.F.R. 1131 et seq., provide for the filing and processing of written temporary authority applications and establish standards and mandatory procedures applicable to all phases of the submission and determination of such applications. Except for supporting statements by the Department of Defense, the rules require "certified" evidentiary statements by the supporting shippers claiming to need the new service, and further require factual statements in a minimum of eleven specific categories. The rules require notice of the proceeding to be given by publication in the Federal Register and authorize protest of the application by "persons who can and will provide all or any part of the proposed service". Each protest must specify the service the protestant can and will offer and must be served upon the applicant. Submission of supplemental data after the applications are filed is not permitted. The ICC rules establish specific evidentiary standards for determination of each application for temporary authority and provide that grants "shall be only made" where the evidence "establishes" an immediate and urgent need in accordance with the prescribed standards.

Rule 49 C.F.R. 1131.4(b)(4) pertaining to single-line service provides:

> "Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority. A grant of temporary authority to effectuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable of, or have failed in, meeting the reasonable immediate and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved."

Plaintiffs assert the initial supporting letter accompanying AFL's temporary application did not provide the information required by 49 C.F.R. 1131.2(c), particularly (8) and (9) thereof, and that granting of the temporary authority in question without a showing of the required information in effect denied them consideration of their protests. Plaintiffs contend no specific failure of service by plaintiffs has been asserted to which specific response could be made and that their response to generalities could only be met by their general assertions.

In their answer, defendants admit:

> "With respect to the allegations contained in the initial complaint, admit that the order of the Commission dated September 3, 1968 may not have been based upon evidence to support its conclusion."

In their brief, the defendants admit:

> "* * * That the Commission's order of September 3, 1968 (1) may not have been based upon evidence to support its conclusions."

These concessions indicate the ICC itself had strong misgivings concerning its compliance with the rules ICC itself had promulgated.

Defendants contend the ICC order dated September 3, 1968 became moot when ICC reopened the proceeding on November 5, 1968. This contention is without merit. Prior to reopening of the proceeding which resulted in the ICC order of September 3, 1968, judicial review of that order had been perfected pursuant to 28 U.S.C. 1336. Jurisdiction thereof vested in and had been exercised by this court in an extended evidentiary hearing wherein ICC actively participated. Following such hearing the stay order of this court was entered. In these circumstances, without prior leave of court, ICC was without authority to take any action which directly or indirectly might nullify or impair the jurisdiction of this court over the ICC order under review.

Defendants further contend that the ICC order of September 3, 1968 was not administratively final. However, at the oral argument on the merits defendants conceded that plaintiffs were properly in court seeking review of that order.

Plaintiffs assert that the September ICC order was administratively final under the Temporary Authority Rules, 49 C.F.R. 1131.6, and that if those rules do not govern, the general ICC rule, 49 C.F.R. 1100.101(a)(2), is applicable:

> "All decisions, orders or requirements of a division of the Commission in any proceeding shall be considered administratively final, except those involving issues of general transportation importance, those wherein the division reverses, changes or modifies a prior decision by a *hearing officer*, and those wherein the initial decision is made by a division." (Emphasis added.)

Indisputably this proceeding did not involve action by a hearing officer, but rather a reversal by ICC Division 1 of a prior determination by its Temporary Authority Board.[3]

Title 28 U.S.C. Section 1336 provides:

> "*Interstate Commerce Commission's orders.* (a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

The Supreme Court stated in *Pennsylvania Railroad Company* v. *United States*, 363 U.S. 202 (1960):

> "We decided some years ago that while a mere 'abstract declaration' on some issue by the Commission

[3] The disposition of an application by a Board does not constitute a hearing before a hearing officer. Compare Trans-American Freight Lines, Inc. v. U.S., 258 F.Supp. 910 (1966).

> may not be judicially reviewable, an order that determines a 'right or obligation' so that 'legal consequences' will flow from it is reviewable. Rochester Tel. Corp. v. United States, 307 U.S. 125, 131, 132, 143, 83 L ed 1147, 1152, 1153, 1159, 59 S.Ct. 754."

And further:

> "We have held that judicial review is equally available whether a Commission order relates to past or future rates, or whether its proceeding follows referral by a court or originates with the Commission. El Dorado Oil Works v. United States, 328 U.S. 12, 90 L ed 1053, 66 S.Ct. 843."

In Inland Steel v. U.S., 306 U.S. 153 (1939), the Court stated:

> "*Third.* The appellant takes the position that the Commission's purported postponement of its command to cease and desist (eighteen months after the interlocutory injunction was granted) deprived the court of authority to enforce the conditions of its interlocutory injunction. However, since the court had exercised jurisdiction to review and suspend the Commission's report and order, the administrative body was without power to act inconsistently with the Court's jurisdiction, had it attempted to do so . . ."

Defendants do not dispute the fact that the ICC order of September 3, 1968 was a final grant of temporary authority to AFL to engage in operations thereunder, subject only to compliance with tariff requirements, and that the order was at that time reviewable by a three-judge court. Defendants have cited several cases[4] in

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[4] Aberdeen & Rockfish RR v. United States, 270 F.Supp. 695 (E.D. La. 1967), Affirmed as Modified 393 U.S. 87 (1968); Alamo Express, Inc. v. United States, 239 F.Supp. 694 (W.D. Tex. 1965), Affirmed 382 U.S. 19 (1965); Donaldson v. Read Magazine, 333 U.S. 178 (1948); United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 294 U.S. 499 (1935); Anchor Line Limited v. Federal Maritime Commission, 299 F.2d 124 (Ct. of Appeals, D.C. 1962); Atchison, Topeka and Santa Fe Railroad Company v. United States, 231 F. Supp. 422 (N.D. Ill. E.D. 1964).

support of their argument that the ICC retains "continuing jurisdiction over its orders at all times." However, none of the cases deals with the question now presented, i.e. whether, after a court has review jurisdiction of an ICC order and a stay of that order has been entered by the court, the ICC may nullify the review and the stay order by reopening the ICC proceedings. The ICC itself has answered this question in Central Freight Lines, Inc. v. Strickland Transportation Lines, Inc., 102 M.C.C. 291.

> ". . . Moreover, when the Court has exercised jurisdiction to review and suspend a report and order of the Commission, we are without power to act inconsistently . . ."

Even if ICC had jurisdiction to reopen the ICC proceeding and to consider the Caputo verified statement, it would not meet the requirements of categories (8) and (9) of ICC Rule 49 C.F.R. 1131.2(c).

The Caputo verified statement fails to show any efforts by the Department of Defense to obtain from existing carriers the service AFL seeks to provide, or the identity of any existing carriers who failed or refused to provide the needed service and the reasons given for any such failure or refusal. Statement of these matters is mandatorily required by categories (8) and (9).

At best, the Caputo verified statement merely states the Department of Defense preference for the continuance of AFL's service and the expansion of that service into single-line service. AFL has been performing service for the Department of Defense under the provisions of 49 U.S.C. 303(b)(5), but no issue pertaining to that service is now before this court. The fact that the Department of Defense may desire a new or expanded type of service by a particular carrier does not justify the granting of temporary authority to provide such service without full compliance with all mandatory ICC rules.

While under 49 U.S.C. 310a(a) the ICC is vested with wide discretion to grant temporary authority for motor carrier services, it may only do so when both conditions specified in the statute are shown to exist, i.e. (1) "an immediate and urgent need" for service, (2) "within a territory having no carrier service capable of meeting such need." It is clear from the language of the statute that in the absence of either one or both of the conditions specified, ICC "has neither power nor discretion to grant temporary authority applications . . . Variable and unpredictable enforcement of important and mandatorily stated rule provisions is inequitable in principle and unsound in practice." Acme Cartage Co. v. U.S., supra, at 456-457.

The court's Findings of Fact and Conclusions of Law are hereby found and held as stated in the foregoing Opinion.

For the reasons stated, we find that the granting of each Temporary Authority referred to in the foregoing Opinion was arbitrary, capricious and erroneous in law. Accordingly, each of the Temporary Authorities should be and hereby is held null and void. The stay order as to each Temporary Authority is continued in effect until further order of this court.

DATED this 26th day of March, 1969.

/s/ Gilbert H. Jertberg
GILBERT H. JERTBERG
United States Court of Appeals Judge

/s/ George H. Boldt
GEORGE H. BOLDT
United States District Court Judge

/s/ William N. Goodwin
WILLIAM N. GOODWIN
United States District Court Judge